Public Prosecutor v Krishnan a/l Letchumanan & Anor

HIGH COURT (TAIPING) — CRIMINAL TRIAL NO PCT 58–4–94
ZULKEFLI JC
23 MARCH 1995

Criminal Law *— Dangerous Drugs Act 1952 — Section 39B(1)(a) — Trafficking in dangerous drugs — Cannabis — Whether cannabis involved proved to be of genus cannabis under s 2 — Whether could be cannabis (Indian hemp) — Whether charge of trafficking made out — Whether charge should be amended to possession under s 12(2) — Dangerous Drugs Act 1952 ss 2, 12(2) & 39B(1)(a)*

Evidence *— Parol evidence rule — Evidence to add to chemist's report — Whether permissible — Evidence Act 1950 ss 91 & 92*

Evidence *— Expert evidence — Chemist's analysis of substance — When court may rule that expert evidence is unsatisfactory*

The two accused were charged with trafficking in 471.75g of cannabis on 21 July 1991, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') read with s 34 of the Penal Code (FMS Cap 45) and punishable under s 39B(2) of the Act. At the trial, the government chemist ('the chemist') who appeared as a prosecution witness, said that the subject matter of the charge was cannabis, a dangerous drug as defined under s 2 of the Act. The chemist, however, did not specifically rule out that the cannabis involved could be cannabis (Indian hemp). In the working sheets on which the chemist based her tests and analysis, it was merely stated that the subject matter of the charge was found to be cannabis. In the chemist's report, she stated that the subject matter of the charge was cannabis as defined in the Act. The defence challenged the oral evidence of the chemist, contending that the evidence given was an afterthought tailored to satisfy current case law. The main issue which arose was whether the cannabis involved in this case was of the genus cannabis under the definition of 'cannabis' in s 2 of the Act.

Held, amending the charge and convicting the accused of possession:

(1) As the prosecution had chosen to state cannabis in the charge, that essential ingredient must be proved beyond all reasonable doubt. On the evidence, it was not clear whether the cannabis involved in this case was cannabis within the definition of 'cannabis' under s 2 of the Act or cannabis falling under Pt I or Pt II of the schedule to the Act or was it cannabis (Indian hemp) under Pt III of the schedule to the Act. While the chemist might be referring to the direct definition of cannabis in s 2 of the Act, there was also a probability that reference was being made to cannabis (Indian hemp).

(2) The contention of the defence was not untenable in the circumstances of the case. Both the working sheets and the chemist's report did not support the oral evidence of the chemist at the trial but supported the contention that the oral evidence of the chemist was an afterthought. Therefore at the close of the case for the prosecution, it had not made out a prima facie case against both the accused beyond all reasonable doubt.

(3) By virtue of ss 91 and 92 of the Evidence Act 1950, the chemist, in her oral evidence, could not contradict or vary or add to her chemist's report which had been issued under s 399 of the Criminal Procedure Code (FMS Cap 6).

(4) Considering the evidence and bearing in mind the fact that it was not disputed that the accused were in possession of the drugs involved, it would be appropriate to amend the charge to a lesser one under s 12(2) of the Act. The accused having pleaded guilty to the amended charge, they were accordingly convicted and sentenced to five years' imprisonment.

Per curiam:

In most cases, the court is normally reluctant to hold that the evidence of a professional witness is unsatisfactory. However, where the accused persons are being charged with a serious offence, the court should apply the stringent requirement of the law.

[Bahasa Malaya summary

Kedua-dua orang tertuduh telah dituduh mengedar 471.75g ganja pada 21 Julai 1991, satu kesalahan di bawah s 39(1)(a) Akta Dadah Berbahaya 1952 ('Akta itu') dibaca bersama dengan s 34 Kanun Keseksaan (NMB Bab 45) dan boleh dihukum di bawah s 39B(2) Akta itu. Di perbicaraan, ahli kimia kerajaan ('ahli kimia itu') yang muncul sebagai seorang saksi pihak pendakwa menyatakan bahawa bahan perkara tuduhan itu adalah ganja, satu dadah berbahaya seperti yang ditakrifkan di bawah s 2 Akta itu. Ahli kimia itu, walau bagaimanapun, tidak secara tertentu mengatakan bahawa ganja yang terlibat itu bukanlah ganja (hemp dari India). Di dalam kertas kerja yang padanya ahli kimia itu mengasaskan ujian dan analisanya, cuma dinyatakan bahawa bahan perkara tuduhan itu telah didapati adalah ganja. Di dalam laporan ahli kimia pula, beliau menyatakan bahawa bahan perkara tuduhan itu adalah ganja seperti yang ditakrifkan di dalam Akta itu. Pihak pembela mempertikaikan keterangan lisan ahli kimia itu, dengan mengatakan bahawa keterangan itu telah diberi sebagai satu pemikiran terkemudian yang dibuat untuk memuaskan undang-undang kes semasa. Isu penting yang timbul adalah sama ada ganja yang terlibat di dalam kes ini adalah daripada genus ganja di bawah takrif 'ganja' di dalam s 2 Akta itu.

Diputuskan, meminda tuduhan itu dan menyabitkan tertudah atas kesalahan pemilikan:

(1) Oleh kerana pihak pendakwa telah memilih supaya menyatakan ganja di dalam tuduhan itu, unsur penting itu mesti dibuktikan melampaui semua keraguan yang munasabah. Atas keterangan, tidaklah jelas sama ada ganja yang terlibat di dalam kes ini adalah ganja mengikut takrif 'ganja' di bawah s 2 Akta itu atau adakah ianya ganja yang jatuh di bawah Bah I atau Bah II jadual kepada Akta itu atau adakah ianya ganja (hemp dari India) di bawah Bah III jadual kepada Akta itu. Sedangkan ahli kimia itu mungkin merujuk kepada takrif langsung ganja di dalam s 2 Akta itu, terdapat juga kebarangkalian bahawa rujukan sedang dibuat kepada ganja (hemp dari India).

(2) Hujah pihak pembela itu bukanlah tidak boleh didirikan atas keadaan kes ini. Kedua-dua kertas kerja dan laporan ahli kimia itu tidak menyokong keterangan lisan ahli kimia itu di perbicaraan tetapi menyokong hujah bahawa keterangan lisan ahli kimia itu adalah satu pemikiran terkemudian. Oleh itu, di penutup kes pihak pendakwa, ianya tidak mendirikan satu kes prima facie terhadap kedua-dua orang tertuduh itu melampaui semua keraguan yang munasabah.

(3) Mengikut ss 91 dan 92 Akta Keterangan 1950, ahli kimia itu, di dalam keterangan lisannya, tidak boleh menyangkal, mengubah atau menambah kepada laporan ahli kimianya yang telah dikeluarkan di bawah s 399 Kanun Acara Jenayah (NMB Bab 6).

(4) Mempertimbangkan keterangan dan memandangkan hakikat bahawa tidaklah dipertikaikan bahawa tertuduh telah memiliki dadah yang terlibat, adalah sesuai untuk meminda tuduhan itu kepada satu tuduhan yang kurang serius di bawah s 12(2) Akta itu. Oleh kerana tertuduh telah mengaku salah kepada tuduhan yang dipinda itu, mereka disabitkan dan dihukum penjara selama lima tahun.

Per curiam:

Di dalam kebanyakan kes, mahkamah biasanya tidak gemar memutuskan bahawa keterangan seseorang saksi profesional itu tidak memuaskan. Namun demikian, di mana tertuduh telah dituduh melakukan kesalahan yang serius, mahkamah patut memakai kehendak ketat undang-undang.]

Notes

For cases on expert evidence, see 7 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 896–961.

For cases on the parol evidence rule, see 7 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1184–1279.

For cases on trafficking in dangerous drugs, see 7 *Mallal's Digest* (4th Ed) paras 54–99; [1989] Mallal's Digest 592–621; [1990] Mallal's

A Digest 463–467; [1991] Mallal's Digest 822–849; [1992] Mallal's Digest 656–671; [1993] Mallal's Digest 526–538.

Cases referred to

Ah Mee v PP [1967] 1 MLJ 220 (refd)
B *Krishnan v PP* [1987] 1 MLJ 292 (folld)
Loo Keck Leong v PP [1992] 2 MLJ 177 (refd)
PP v Lai Kon Ching & Anor [1994] 4 CLJ 865 (refd)

Legislation referred to

C Criminal Procedure Code (FMS Cap 6) s 399
Dangerous Drugs Act 1952 ss 2, 11(1), 12(2), (3), 37(da), 39B(1)(a), (2)
Evidence Act 1950 ss 91, 92
Penal Code (FMS Cap 45) s 34

D *Murtazadi Amran* (Deputy Public Prosecutor) for the Public Prosecutor.
K Kumaraendran (*Kumar, tham & Co*) for both accused.

Zulkefli JC: The two accused persons were charged with trafficking in dangerous drugs, to wit, cannabis weighing 471.75g, at about 9.45pm on
E 21 July 1991 at Jalan Keretapi, Kampong Station, Kuala Kangsar, in the District of Kuala Kangsar, Perak, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') read with s 34 of the Penal Code (FMS Cap 45) and punishable under s 39B(2) of the same Act.

The facts of the case are not much in dispute. The case revolves
F around the role of two agent provocateurs in their dealings with the sale transaction of the cannabis by the two accused persons. Chief Insp Mohd Zorki Bin Saad (SP5) ('Zorki'), the agent provocateur, in his evidence stated that on 21 July 1991 at about 4.15 pm he and Det Sgt Maj Saidin ('Saidin') through Det Cpl Aziz met an informer at the rest house in Kuala Kangsar, Perak where they were briefed by the said informer about a male
G Indian who was trafficking in cannabis at Kampong Station in Kuala Kangsar. Zorki then requested the informer to introduce himself and Saidin to the male Indian as the would be buyer with a view to arresting him thereafter.

At about 4.30pm on the same day, Zorki, Saidin and the informer
H left the rest house by car No BBA 522 for Kampong Station, Kuala Kangsar to meet the male Indian. They met the male Indian outside an Indian temple where the informer introduced Zorki and Saidin as the buyer of the cannabis. The male Indian introduced himself as Krishnan who is the first accused person. The first accused later introduced the
I second accused to Zorki. Negotiations for the purchase of the cannabis and the price were held between Zorki and the first accused. The second accused later brought a plastic packet containing the said cannabis and handed it over to Zorki who after seeing it agreed to buy at the price of RM6 per packet. The first accused wanted to sell the cannabis immediately

after the negotiation but Zorki did not agree but instead told the first accused that he would be coming again to the same place to buy the said cannabis from the first accused between 9.30pm and 10pm that night on 21 July 1991. The first accused agreed with Zorki's proposal but told Zorki to come to the place not by car but by using a motorcycle.

After this meeting with the two accused persons, Zorki, Saidin and the informer went back to the rest house in Kuala Kangsar. Zorki then directed Det Cpl Aziz to send the informer back to his house and the informer's role in this case ended here. Meanwhile Zorki then briefed and prepared his ambush team to effect the arrest of the two accused persons at their scheduled meeting that night on 21 July 1991.

Zorki and Saidin came to the scene of the incident that night on 21 July 1991 by motor cycle and at the same time the other members of the police party took their ambush potion which was between the house No 316, Kampong Station, Kuala Kangsar and a railway godown near a railway station. When Zorki and Saidin met the two accused persons again a short discussion took place between Zorki and the first accused over the sale transaction of the said cannabis. The second accused was thereafter seen to have gone to the railway godown nearby and soon later the second accused came back riding a bicycle and carrying a plastic bag containing the said cannabis. The second accused later handed the plastic bag to Zorki. Having satisfied himself that the plastic bag contained cannabis Zorki then made a remark to the two accused persons by stating the word 'Polis'. The first and second accused tried to escape but with the assistance of the other members of the police ambush team at the scene, both of them were subdued and arrested.

At the close of the case for the prosecution, I find that the prosecution has not made out a prima facie case against both the accused beyond all reasonable doubt on the charge framed against them. One of the essential ingredients of the charge to be proved is whether the prosecution has proved beyond all reasonable doubt that the cannabis involved in this case is of the genus cannabis under the definition of 'cannabis' in s 2 of the Act. As the offence in this case was committed on 21 July 1991, the old definition of 'cannabis' applied. The new definition of 'cannabis' by virtue of the amending Act (Act A834/92) only took effect from 4 September 1992.

Having heard and critically analysed the evidence of the government chemist, Ms Lam Yoke Ching (SP4), I find that a point of law arises as to whether the cannabis involved is a cannabis within the definition of 'cannabis' under s 2 of the Act or it is cannabis falling under Pt I or Pt II or is cannabis (Indian hemp) under Pt III of the First Schedule to the Act. I have to take this view because under the definition of 'dangerous drug' in the same s 2 of the Act, it means any drug or substance which is for the time being comprised in the First Schedule. It is in the light of these two definitions of 'cannabis' and 'dangerous drug' as defined in s 2 of the Act that I have to evaluate the evidence of SP4.

SP4 in her oral evidence at the trial stated, inter alia, that cannabis is a dangerous drug as defined under s 2 of the Act. SP4 also stated that 'cannabis' means any part of any plant of the genus cannabis from which the resin has not been extracted by whatever name it may designated.

I am of the view that even if the chemist, SP4, is referring to the direct definition of 'cannabis' as in s 2 of the Act, nevertheless it appears to me there is a doubt as to whether the cannabis involved is cannabis within the definition of 'cannabis' under s 2 of the Act. In the mind of the chemist, SP4, she may be very much referring to the direct definition of 'cannabis' under s 2 of the Act but the probability that it may also refer to cannabis (Indian hemp) by virtue of the definition of 'dangerous drug' in s 2 of the same Act which also includes cannabis (Indian Hemp) could not be ruled out. I could not find on this issue anywhere in the evidence of SP4 she has stated that she has ruled out specifically that the cannabis involved could be cannabis (Indian Hemp).

I also find that both the learned deputy public prosecutor ('DPP') and the learned counsel for the two accused persons had refrained from putting across this issue as to whether the cannabis involved could or could not be cannabis (Indian hemp) to SP4 for her to answer in her evidence for reasons best known to themselves. However in this case, the defence had strongly challenged the evidence given by SP4 in that it was an afterthought when she stated that the cannabis involved was of the genus cannabis within the definition of 'cannabis' in s 2 of the Act. It was submitted for the defence that SP4 had tailored her evidence after the decision of the case of *Loo Keck Leong v PP* [1992] 2 MLJ 177 and the case of *PP v Lai Kon Ching & Anor* [1994] 4 CLJ 865. In *Loo Keck Leong*'s case, the Supreme Court ruled that the court was not satisfied that the prosecution had proved beyond a reasonable doubt that the cannabis involved in the case was of the genus cannabis as defined by the Act as alleged by the chemist. The Supreme Court arrived at the said finding because the chemist who analysed the incriminating exhibits seized from the accused and found them to be cannabis, was found to have said in his evidence to quote, 'By cannabis I mean cannabis as defined in the Dangerous Drugs Act 1952'. There was no evidence the chemist had stated that the cannabis on which he carried out the test was cannabis material from which resin had not been extracted. The Supreme Court held that in view of this evidence by the chemist, the benefit of doubt as to whether the resin has been so substantially extracted ought to be given to the accused. In *Lai Kon Ching*'s case, the government chemist who gave evidence incidentally is the same chemist (SP4) as in this case and she was found to have only stated in her evidence that: 'Cannabis is as defined in the Dangerous Drugs Act 1952'. This was also repeated and reflected in her chemist's report. It was argued by the defence that as the said chemist did not specifically say that the cannabis is as defined in s 2 of the Act it followed that the term cannabis as referred by the chemist may even refer to the term cannabis as specified in Pts I and II or even to Pt III of the First Schedule to the Act where the term cannabis has been defined to mean

cannabis (Indian hemp) and cannabis resin (resin of Indian hemp). Abdul Malik Ishak J on this point in the said case had this to say:

> It goes without saying that as Lam was not very specific in her treatment of the term cannabis, an inference most favourable to the accused persons must be adopted (*Tai Chai Keh v PP* [1948–49] MLJ Supp 105). In my judgment, the term cannabis as adverted to by Lam could refer to Indian hemp and that being the case I have no choice but to construe it as such. The accused persons are entitled under the law to take advantage of any imperfection in the prosecution's case, after all the duty of the prosecution throughout the trial is to prove its case beyond reasonable doubt.

It is my considered view that the defence contention that the evidence given by SP4 was an afterthought when she stated in her oral evidence that the cannabis involved is of the genus cannabis within the definition of 'cannabis' in s 2 of the Act is not untenable in the circumstances of the case. The challenge made by the defence on this issue is not without evidence. In the course of the cross-examination of SP4 at the instance of the defence, the working sheets (exh D18) on which SP4 based her tests and analysis of the cannabis involved was produced and its contents challenged by the defence. I find as a matter of fact, nowhere in D18 has she stated that the cannabis involved came within the direct definition of 'cannabis' in s 2 of the Act. At the conclusion of SP4's analysis on the plant material involved as shown in D18, she only stated the following: 'I found the plant material in the 490 packets to be cannabis.'

It is my view that if SP4 was actually referring to the direct definition of 'cannabis' as in s 2 of the Act surely it must reflect on the working sheets D18 and further she must say beyond what she has stated therein. I find this omission in D18 on the part of the chemist, SP4, shows that it was an afterthought when she gave oral evidence by supplementing the definition of cannabis as specified in s 2 of the Act.

I further find support in holding to the view that it was an afterthought by the chemist, SP4, in her oral evidence in supplementing the definition of cannabis as specified in s 2 of the Act if the chemist's report (exh D24), also produced at the instance of the defence is taken into consideration. In the chemist's report, D24, issued by SP4 on 15 October 1991 and handed to the investigating officer, Chief Insp Sulaiman bin Salleh (SP10), on 22 October 1991, SP4 only stated that 'cannabis' is as defined in the Act. Arising from this point, I am of the view that SP4 in her oral evidence should not be allowed to vary and supplement her chemist's report, D24, which was issued under s 399 of the Criminal Procedure Code (FMS Cap 6) (CPC'), which is required by law to be reduced into writing. It is my view that SP4 cannot vary the contents of her report, D24, by her oral evidence by virtue of the provisions of ss 91 and 92 of the Evidence Act 1950. Section 91 of the Evidence Act 1950 equally applies to criminal trial and it categorically states in the form of the following relevant provision:

> ... in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms ... of the matter except the document itself ...

The chemist's report, D24, was reduced into writing after the conclusion of SP4's laboratory test and analysis on the cannabis involved and it was a report within the meaning of s 399 of the CPC. By virtue of s 92 of the Evidence Act 1950, all oral evidence seeking to contradict or vary or add to what was set out in writing in D24 shall be excluded. (See the case of *Ah Mee v PP* [1967] 1 MLJ 220.) Hence notwithstanding that SP4 in her evidence at the trial had stated that the plant material she had analysed was cannabis within the direct definition of 'cannabis' as in s 2 of the Act, I am of the view that whatever oral evidence SP4 had stated would be in the circumstances an afterthought. It was given with a view to tailoring her evidence after the decision of the earlier decided cases of *Loo Keck Leong v PP* [1992] 2 MLJ 177 and *PP v Lai Kon Ching & Anor* [1994] 4 CLJ 865.

Encik Murtazadi, the learned DPP, had submitted before me that if the court were to find that the cannabis involved was in fact cannabis (Indian hemp) then the court could still call upon the two accused persons to enter their defence on the amended charge of trafficking in cannabis (Indian hemp) under s 39B(1)(a) of the Act because under the term 'dangerous drug' in s 2 of the Act read together with the First Schedule to the Act it would include cannabis (Indian hemp). The learned DPP went on to say that if this stand was taken by the court, even though the prosecution could not rely on the presumption in s 37(da) of the Act because the drug involved is cannabis (Indian hemp), nevertheless it was submitted that the prosecution could still rely on the direct evidence adduced at the trial. The term 'trafficking' as defined in s 2 of the Act includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug. Based on the evidence adduced in this case and on the definition of 'trafficking' it was submitted that the prosecution has proved beyond all reasonable doubt that the accused was trafficking in cannabis (Indian hemp). On this point, I find I could not accede to this noble proposition of the learned DPP. I am of the view since the prosecution chose to put cannabis in the charge it follows that that essential ingredient must be proved beyond all reasonable doubt. It is not for the defence to prove otherwise. In most cases the court is normally reluctant to hold the evidence of a professional witness like SP4, the chemist, unsatisfactory but where the accused persons are being charged with a serious and heinous offence, the court should go for the stringent requirement of the law. I am taking this approach in this case in view of the unsatisfactory oral evidence of SP4 when tested against the documentary evidence, D18 and D24, as regards the proof of the essential ingredient of the charge as to whether the cannabis involved is 'cannabis' within the definition of s 2 of the Act or it is cannabis (Indian hemp) under the definition of 'dangerous drug' in the same s 2 of the Act. In the Supreme Court case of *Krishnan v PP* [1987] 1 MLJ 292 at p 295, Wan Suleiman SCJ had this to say:

> It is one of the most basic rules of justice that however heinous a crime a person is accused of, whatever the rank of the person who testifies against him, he can only be convicted on evidence produced according to the stringent requirements of the law. It cannot be questioned that the offence of trafficking is a very serious one, the gravity of which is reflected in the sentence, in this case, the sentence of death. But it does not mean that a person accused of one of the most serious crimes known to our law is not entitled to equal protection before the law and one of those items of protection to which he is entitled is that his guilt must be proved in accordance with or in a manner required by law. Anything less will not be enough.

In this case even though I am not inclined to amend the charge to that of trafficking in cannabis (Indian hemp) as urged by the learned DPP for reasons herein before stated, I find that on the evidence available and bearing in mind of the fact that it is not disputed that the accused persons were in possession of the drugs involved, it would not be inappropriate for me to amend the charge to a lesser one under s 12(2) of the Act which provides, 'No person shall have in his possession, custody or control any dangerous drugs to which this Part applies'.

The words 'this Part applies' refer to Pt IV of the Act which comprised the provisions of ss 11–17 of the Act. If one turns to s 11(1) of the Act it says this part applies to dangerous drugs listed in Pts III, IV and V of the First Schedule to the Act. And if one turns to Pt III of the First Schedule one will find cannabis (Indian hemp) listed therein. One cannot rule out the probability that this cannabis (Indian hemp) was the cannabis that could have been meant by the chemist, SP4, having regard to her oral evidence and the documentary evidence, D18 and D24. For that reason it is my view that it would be proper that the accused persons be charged for the lesser offence of possession of cannabis (Indian Hemp) under s 12(2) and punishable under s 12(3) of the Act. This is consistent with the rules of evidence that whenever there are two constructions of inferences, the more favourable one must be given to the accused and should be applied.

The charge was accordingly amended from s 39B(1)(a) to s 12(2) of the Act against the two accused persons. The amended charge was framed, read and explained to the accused persons who both pleaded guilty to the charge, having understood the nature and consequences of their plea.

The facts of the case as stated by the learned DPP were as per evidence of SP5. Both the accused persons admitted the facts of the case without qualification. Upon their plea of guilt and admitting the facts of the case without qualification, I duly recorded a finding of conviction on both the accused persons on the amended charge. In mitigation of sentence, Encik Kumaraendran, the learned counsel for the accused persons stated that even though both the accused persons had pleaded guilty at this stage of proceeding, they were ready willing to plead guilty on a reduced charge even much earlier if such charge had been presented by the prosecution. Their willingness to plead guilty clearly showed their remorsefulness and the fact that they had pleaded guilty, had saved the court's time. It was also urged on behalf of both the accused persons that whatever sentence the

court would impose the sentence was to take effect from the date of their arrest on 21 July 1991. The learned DPP left it to the court to impose the appropriate sentence. As regards sentence, I have taken into consideration the question of public interest, the circumstances and the manner in which the offence was committed, the interests of both the accused persons, the question of deterrence to both the accused persons and would-be offenders and the rampancy of the offence before imposing sentence on both the accused persons. In the circumstances, I hereby sentence each of the accused persons to five years' imprisonment with effect from the dates of their arrests. All the exhibits were ordered to be kept by the court pending appeal, if any.

Accused convicted.

Reported by Kevin Ooi